

**BOARD OF ALIEN LABOR CERTIFICATION APPEALS**  
**800 K STREET, N.W.**  
**WASHINGTON, D. C. 20001-8002**

DATE: December 2, 1996

CASE NO: 94-INA-512

In the Matter of:

TESTWELL CRAIG LABS OF N.J., INC.,  
Employer,

On Behalf of:

BHARGAVAKUMAR KANUBHAI SHAH,  
Alien

Appearance: Alan E. Heckler, Esquire, New York, NY  
for the Employer

Before: Huddleston, Vittone, and Wood  
Administrative Law Judges

PAMELA LAKES WOOD  
Administrative Law Judge

**DECISION AND ORDER**

This case arose from an application for labor certification on behalf of Alien Bhargavakumar Kanubhai Shah ("Alien") filed by Employer Testwell Craig Labs of N.J., Inc. ("Employer") pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, New York City, denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26.

Under Section 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is

to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

### **STATEMENT OF THE CASE**

On January 27, 1992, Employer filed an application for labor certification to enable the Alien, an Indian national, to fill the position of "Civil Engineer (Assistant)" at a salary of \$17.57 hourly. Five years of experience in the job offered or in the related occupation of "Highways, Bridges & Bldgs., Construction Related" and four years of College with a Bachelor's Degree in Civil Engineering, with a major in "Highways, Bridges, Bldgs." were required. The job offered was described as:

Assist Chief Engineer in the Office, perform engineering inspections of bridge, highway and commercial building construction and supervise civil engineering related quality control inspections.

(AF 11-14). Under "Other Special Requirements," the following was listed:

Minimum five (5) years of experience (***sic***) after graduation with civil engineering degree. Prospective employee to be eligible for State Board professional licencing (***sic***) examination. State Board requires minimum five (5) years of experience.

(AF 14).

A transmittal from the state agency indicated that there were 18 applicants, all of whom were rejected by the Employer; the state agency indicated applicant Anthony Wu was interested in the position, contrary to the Employer's assertion. (AF 103-107; ***compare*** AF 97).

On August 2, 1993, the CO issued a Notice of Findings in which she notified the Employer of the Department of Labor's intention to deny the application. Specifically, the CO indicated that the Employer needed to further document the basis for rejecting one of the U.S. applicants, Anthony Wu (as he appeared to be qualified) as well as the

adequacy of the recruitment efforts relating to several other applicants (citing 20 C.F.R. §§ 656.20(c)(8), 656.21(b)(7),<sup>1</sup> and 656.24(b)(2)(ii)). (AF 108-111).

The Employer submitted its rebuttal on August 27, 1993 through the letter of its Vice President and attachments. (AF 112-131).

The CO issued a second Notice of Findings on September 17, 1993, indicating that the rebuttal documentation was "insufficient/incomplete." (AF 132-134.)

The Employer submitted additional rebuttal documentation that was received on November 23, 1993. (AF 135-167).

On November 29, 1993, the CO issued a Final Determination in which she accepted the Employer's rebuttal with respect to the applicants except for applicant Wu. With respect to applicant Wu, she found the rebuttal inadequate and denied the application on that basis. (AF 169-171).

The Employer, through its attorney, requested reconsideration or review of that denial on December 31, 1993. (AF 172-192). The CO did not rule on the Employer's motion to reconsider.

## DISCUSSION

As a preliminary matter, we will not consider documentation submitted by the Employer in connection with the request for review, although the arguments made have been considered. Our review is to be based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. § 656.27(c). **See also** 20 C.F.R. § 656.26(b)(4). Here, the Employer has failed to assert a basis for not having submitted the subject documentation as part of its rebuttal and it should not be considered now. **See Sharp Screen Supply, Inc.**, 94-INA-214 (May 25, 1995); **ST Systems, Inc.**, 92-INA-279 (Sept. 2, 1993); **Schroeder Brothers Co.**, 91-INA-324 (Aug. 26, 1992); **Kem Medical Products Corp.**, 91-INA-196 (June 30, 1992).

Section 656.21(b)(6)<sup>2</sup> provides that if U.S. applicants have applied for the job opening, the employer must document that such applicants were rejected solely for job-related reasons; section 656.20(c)(8) provides that the application must show the job opportunity has been and is open to any qualified U.S. worker; and section 656.21(j) requires the employer to provide the local office with a written report of the results of

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<sup>1</sup> The correct reference is 20 C.F.R. § 656.21(b)(6).

<sup>2</sup> All section references are to title 20 of the Code of Federal Regulations.

the employer's post-application recruitment efforts. Under section 656.24(b)(1), the CO's determination whether to grant labor certification is made on the basis of whether the employer has met the requirements of Part 656, but labor certification may be granted despite harmless error, provided that the job market has been tested sufficiently to warrant a finding of unavailability. Under section 656.24(b)(2)(ii), the CO's determination is made based upon whether there is a U.S. worker who is able, willing, qualified, and available for the job opportunity; such worker will be considered able and qualified if "by education, training, experience, or a combination thereof, [the worker] is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed."

In general, an applicant is considered qualified for the job if he or she meets the minimum requirements specified by an employer's application for labor certification. ***The Worcester Co, Inc.***, 93-INA-270 (Dec. 2, 1994); ***First Michigan Bank Corp.***, 92-INA-256 (July 28, 1994). However, an employer may reject an applicant who meets the stated requirements but is nevertheless demonstrably incompetent to perform the main duties of the job, based upon information obtained from references or objective testing during the interview. ***First Michigan Bank Corp., supra.*** Where an applicant's resume shows a broad range of experience, education, and training that raises a reasonable possibility that the applicant is qualified, even if it does not state that he or she meets all the job requirements, an employer should further investigate the applicant's credentials by an interview or otherwise. ***See Dearborn Public Schools***, 91-INA-222 (Dec. 7, 1993) (*en banc*); ***Gorchev & Gorchev Graphic Design***, 89-INA-118 (Nov. 29, 1990) (*en banc*).

The Employer claims that it had the following valid bases for rejecting applicant Wu, an ostensibly qualified applicant: (1) inability to communicate clearly and effectively in English; (2) unwillingness to travel for field inspections in New York City and lack of interest in the job by applicant Wu; (3) lack of structural steel experience; and (4) frequency of changing jobs (although the Employer acknowledges that the last reason would not be a valid reason for rejection for the labor certification process). (AF 188-192). The second and third bases are also invalid, as there is no indication that the job was actually offered to applicant Wu, and structural steel experience is not a listed job requirement. With respect to the first basis, we agree that if the Employer can establish that applicant Wu's communication skills were lacking to the extent that it would prevent him from adequately performing the job, it would be a valid basis for his rejection.

The burden is on an employer to demonstrate that an applicant is not qualified for the position because of an inability to communicate in English. Where the employer rejects a U.S. worker for poor communication skills but fails to explain what relation poor communication skills bear on the performance of the job duties, it has rejected that worker for other than lawful, job-related reasons. ***Spizer, Inc.***,

94-INA-383 (Oct. 25, 1995), *citing Impell Corp.*, 88-INA-298 (May 31, 1989) (*en banc*) and *Hughes Aircraft Co.*, 88-INA-325 (March 21, 1989) (*en banc*). *See also Domenico Marino*, 94-INA-245 (July 19, 1995); *Lighting Bazaar*, 88-INA-269 (Oct. 2, 1989).

We disagree with the CO that the response submitted by applicant Wu reflects a command of the English language; the narrative comments are limited to:

I have experience in civil/stru/soil eng'g. . . .

I did not get any notice after the interview (7-20-92).

If I was not hired, there might have someone they thought more appropriate for their job requirements. AW 7-31-92 . . .

I got letter from the firm stated that they hired someone else to fill that position. AW 8-21-92

(AF 98). While these brief responses are not unintelligible, they are not particularly polished either and do not indicate much about the applicant's ability to communicate orally in English, particularly in the on-site setting contemplated by the Employer. The state agency unfortunately did not ask Mr. Wu about his English communication skills when it asked him about how he had been treated by the Employer.

In the Employer's initial response, the Employer stated that "Mr. Wu does not communicate very well." Subsequently, the Employer's Vice President stated that:

Mr. Wu graduated from Taiwan and worked in Taiwan between 1967 and November 1985. . . . During the interview, Mr. Wu had a hard time understanding the interviewing officer and when he answered the questions, he could not bring out his knowledge. It appeared that Mr. Wu was academically intelligent and had extensive field experience from Taiwan; but he could not express it in words. For a service oriented business of Testwell Craig, we feared that our client may not have the same patience to hear out Mr. Wu. . . .

(AF 130). The Employer further indicated that based on past experience, clients have asked for replacements when confronted with such employees. (AF 130). As noted above, the job duties include supervision of civil engineering related quality control inspections.

As part of its reconsideration request, the Employer submitted further documentation on this issue.

Under **Gencorp**, 87-INA-659 (Jan. 13, 1988) (*en banc*), a written assertion that is reasonably specific and supported by a reasoned analysis constitutes documentation that must be considered. A subjective reason for rejecting a U.S. applicant is not necessarily unlawful, but it will be deemed objectionable if the employer fails to verify the subjective reason or document how the interviewer came to the subjective conclusion or how the subjective reason for rejection relates to the job duties. **Jackson Hole Wyoming**, 94-INA-539 (March 5, 1996); **see also Mr. and Mrs. Jeffrey Hines**, 88-INA-510 (Apr. 9, 1990). As the assertions by the Employer's Vice President concerning applicant Wu's ability to communicate are sufficiently detailed and reasoned, are not inherently implausible or inconsistent, and have not been refuted, they should be accepted as adequate documentation of the applicant's lack of ability to communicate and his lack of qualifications for the position.

We note that even if we were to agree with the CO as to the bases for rejection of this labor certification application, we would have to remand this case because the CO never ruled on the Employer's motion for reconsideration. **See, e.g., Charles Serouya & Son, Inc.**, 88-INA-261 (March 14, 1989) (*en banc*).

In view of the above, the Employer's rebuttal was adequate and the labor certification application should be granted.

### ORDER

The Certifying Officer's denial of labor certification is hereby REVERSED and the Certifying Officer is directed to GRANT labor certification.

For the Panel:

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PAMELA LAKES WOOD  
Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W.  
Suite 400  
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

BALCA VOTE SHEET

Case Name: TESTWELL CRAIG LABS OF NJ, INC.  
(Alien: Bhargavakumar Kanubhai Shah)

Case No. : 94-INA-512

PLEASE INITIAL THE APPROPRIATE BOX.

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Thank you,

Judge Wood

Date: